

9 FAM 45.1 Notes

9 FAM 45.1 N1 Possible Impact at Posts World-wide

(TL:VISA-45; 6-14-91)

Although alien beneficiaries of section 124 of the Immigration Act of 1990 must have been resident in Hong Kong and employed in Hong Kong at the time of petition approval, there is no requirement that they remain in Hong Kong after the petition is approved. Since beneficiaries of this section may also benefit from the provisions of section 154, which provides for extended validity of an immigrant visa up to January 1, 2002, it is quite possible that they could appear for visa issuance or an assessment of their readmissibility at any consular post. Consular officers should, therefore, familiarize themselves with this material, as well as the information in section 9 FAM 42.72.

9 FAM 45.1 N2 Effective Dates

(TL:VISA-45; 6-14-91)

Section 124 of the Immigration Act of 1990 took effect on November 29, 1990. Employees of certain United States businesses in Hong Kong who meet the requirements of N3 below and their spouse and children may apply for visas under section 124 during fiscal years 1991 through 1993.

9 FAM 45.1 N3 Requirements for Status Under Immigration Act of 1990 Section 124

(TL:VISA-84; 9-15-93)

a. An alien shall be classifiable as an immigrant under section 124 if the alien is:

(1) A resident of Hong Kong; and

(2) Employed in Hong Kong and has been so employed during 12 previous, consecutive months, except for temporary absences at the request of the employer; and

(3) An officer, supervisor or acting in a capacity that is managerial, executive or involves specialized knowledge [see N4 below for definitions];

(4) Employed by a business entity which:

(a) Is owned and organized in the United States or is the subsidiary or affiliate of a business owned and organized in the United States;

(b) Employs at least 100 employees in the United States and at least 50 outside the United States; and

(c) Has a gross annual income of at least \$50,000,000 and

(5) The alien has an offer of employment from such business entity in the United States as an officer or supervisor or in a capacity that is managerial, executive or involves specialized knowledge; and

(6) The offer of employment in the United States is:

(a) Effective from the time of filing the petition for classification under this section through and including the time of entry into the United States; and

(b) Provides a salary and benefits comparable to the salary and benefits provided to others with similar responsibilities and experience within the same company.

9 FAM 45.1 N4 Definitions

9 FAM 45.1 N4.1 Affiliate

(TL:VISA-45; 6-14-91)

The term “affiliate” for the purpose of this section shall mean one of two subsidiaries both of which are owned and controlled by the same parent, or individual or one of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

9 FAM 45.1 N4.2 Executive Capacity

(TL:VISA-45; 6-14-91)

The term “executive capacity” as defined in INA section 101(a)(44)(B) of the Immigration and Nationality Act, means an assignment within an organization in which the employee primarily:

(1) Directs the management of the organization or a major component or function of the organization;

(2) Establishes the goals and policies of the organization, component, or function;

(3) Exercises wide latitude in discretionary decision-making; and

(4) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization. [See also section 9 FAM 41.54 N4.2-1.]

9 FAM 45.1 N4.3 Managerial Capacity

(TL:VISA-45; 6-14-91)

a. The term “managerial capacity” as defined in INA 101(a)(44)(A) means an assignment within an organization in which the employee primarily:

(1) Manages the organization, or a department, subdivision, function, or component of the organization;

(2) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(3) If another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organization hierarchy or with respect to the function managed; and

(4) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.

b. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of supervisory responsibilities unless the employees supervised are professional. [See also section 9 FAM 41.54 N4.2-1.]

9 FAM 45.1 N4.4 Officer

(TL:VISA-45; 6-14-91)

The term “officer” with respect to a business entity means, the chairman or vice-chairman of the board of directors of the entity, the chairman or vice-chairman of the executive committee of the board of directors, the president, any vice-president, any assistant vice-president, any senior trust officer, the secretary, any assistant secretary, the treasurer, any assistant treasurer, any trust officer or associate trust officer, the controller, any assistant controller, or any other officer of the entity customarily performing functions similar to those performed by any of the above officers.

9 FAM 45.1 N4.5 Parent

(TL:VISA-45; 6-14-91)

For the purpose of this section the term “parent” shall mean a firm, corporation, or other legal entity which has subsidiaries.

9 FAM 45.1 N4.6 Specialized Knowledge

(TL:VISA-45; 6-14-91)

An alien is considered to be serving in a capacity involving specialized knowledge with respect to a company, if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company. [See section 9 FAM 41.54 N4.2-2.]

9 FAM 45.1 N4.7 Subsidiary

(TL:VISA-45; 6-14-91)

A “subsidiary” means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power; or owns, directly or indirectly, less than half the entity, but in fact controls the entity.

9 FAM 45.1 N4.8 Supervisor

(TL:VISA-45; 6-14-91)

The term “supervisor” for the purposes of this section of law means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgement.

9 FAM 45.1 N4.9 U.S. Business

(TL:VISA-45; 6-14-91)

The term “U.S. business”, as used in this section, means an entity or organization created under the laws of the United States which has a U.S. principal place of business and which is at least 50 percent owned by U.S. citizens or permanent residents.

9 FAM 45.1 N5 Petition Procedure

9 FAM 45.1 N5.1 Where to File

(TL:VISA-84; 9-15-93)

An alien entitled to status under section 124 of the Immigration Act of 1990 must be the beneficiary of an approved Form I-140 petition filed by the U.S. employer with the Service Center of the Immigration and Naturalization Service having jurisdiction over the U.S. corporate headquarters of the U.S. business.

9 FAM 45.1 N5.2 Supporting Documentation

(TL:VISA-45; 6-14-91)

The Form I-140, Petition for Prospective Immigrant Employee, must be accompanied by the Form ETA-750B, Statement of Qualifications of Aliens and a letter of employment from the U.S. employers.

9 FAM 45.1 N5.2-1 Intending Immediate Immigration

(TL:VISA-45; 6-14-91)

If immigration is to be immediate (within four months of visa issuance), the employer must supply a specific job description attesting that the alien will be employed in one of the qualifying positions and that salary and benefits will be comparable to those provided to other employees with similar responsibilities and experience within the same company.

9 FAM 45.1 N5.2-2 Intending Deferred Immigration

(TL:VISA-45; 6-14-91)

Since section 154 of the Immigration Act of 1990 permits an alien entitled to status under section 124 to defer immigration until September 1, 2001, if the alien plans to defer immigration, the petition may be supported by a general letter of employment indicating that the employer will have a qualifying job available at the time the alien employee enters the United States as an immigrant. However, an alien whose petition is supported by a general letter of employment is subject to a redetermination of admissibility at the time of travel and at such time must submit a specific offer of employment which includes the job title, a description of job duties, and details of the salary and benefits to be offered the beneficiary.

9 FAM 45.1 N5.3 Telegraphic Notification of Petition Approval

(TL:VISA-84; 9-15-93)

a. The Immigration and Naturalization Service (INS) plans to transmit petitions approved under section 124 telegraphically by VISAS NINETY-SEVEN cable. In addition, INS will send to posts the actual approved petition and supporting documents. However, posts should be able to complete processing in most cases on the basis of the telegraphic authorization.

b. The VISAS NINETY-SEVEN cable shall contain the following information:

(1) INS file number, if any;

(2) Name, date and place of birth of beneficiary;

(3) Name, dates and places of birth of dependents;

(4) Employment history of beneficiary, including occupation and specialized knowledge;

(5) Filing date of petition;

(6) Name, address and telephone number, both in the United States and in Hong Kong, of the petitioner;

(7) Indication of whether petition is based on specific or general job offer; and

(8) Job title and location, if a specific job is offered.

